Filed 6/14/16 Burk v. Hirsch CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

GERRY BURK, Plaintiff and Appellant, v. FARAH HIRSCH, Defendant and Respondent.	B266666 (Los Angeles County Super. Ct. No. BC500848)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gerald Rosenberg, Judge. Reversed.

Gerry Burk, in pro. per., for Plaintiff and Appellant.

Gershuni Law Firm and Gregory Gershuni for Defendant and Respondent.

Gerry Burk (Plaintiff or Burk) contends that the trial court erred by sustaining the demurrer of Farah Hirsch (Defendant or Hirsch) to his first amended complaint (FAC) without leave to amend. We agree.

Burk, a paralegal, agreed, for a fee, to help Hirsch collect money owed to her by her ex-husband who had filed for bankruptcy protection. Although Burk was not a lawyer, and although the allegations in his amended pleading state that he told Hirsch he could "only act as a scrivener," other allegations in his amended pleading and exhibits attached thereto suggest that he may have gone beyond the role of a mere scrivener and acted as Hirsch's legal counsel in the bankruptcy proceeding. For example, Burk agreed to "represent" Hirsch in the bankruptcy proceeding and this representation included "obtain[ing] a different repayment plan" than the one proposed by Hirsch's ex-husband. When Hirsch failed to pay Burk any money for his services in securing a different repayment plan, he sued her.

Hirsch demurred to the FAC generally and specifically, arguing, inter alia, that all causes of action were fatally flawed because they were premised on an "unlawful, illegal agreement by which . . . Burk engaged in the illegal, unauthorized practice of law." The trial court apparently agreed, for it sustained the demurrer without leave to amend.[1]

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[1] The court's minute order sustaining Hirsch's demurrer is silent with respect to the grounds for the ruling. Hirsch contends that the trial court expressly ruled that her demurrer was sustained on the grounds that all the claims were premised on an illegal contract. Hirsch's contention, however is based not on a document prepared by the court, but on a notice of ruling prepared by her counsel that merely construes the court's ruling. For his part, Burk agrees that the "[t]rial court failed to elaborate" on why the demurrer was sustained, but believes the demurrer was sustained because he failed to attach exhibits to his amended pleading, exhibits that the court requested when it sustained Hirsch's demurrer to his original complaint in this action.

The omission of the grounds for the ruling is contrary to the rules of civil procedure. (See Code Civ. Proc., § 472d; *Fremont Indemnity Co. v. Fremont General Corp*. (2007) 148 Cal.App.4th 97, 111.) Assuming that Burk did not waive application of the statute to the court's order, the trial court's failure to specify the grounds for sustaining the demurrer is not reversible error per se; rather, "'the court's ruling will be

On appeal, Burk argues that even if the FAC can be read to be based on an illegal agreement regarding the unauthorized practice of law (an interpretation which he disputes), he either successfully pleaded around this defect or Hirsch is estopped from raising the issue, as she previously and successfully argued before the bankruptcy court that there was nothing illegal about her agreement with Burk.

We agree with Burk's primary contention, that his amended complaint does not necessarily allege an illegal contract for the unauthorized practice of law. Fairly read and liberally construed, the amended complaint can be interpreted in a manner different than that advanced by Hirsch. At the pleading stage, we are obliged to credit Burk's interpretation of the agreement at issue, not Hirsch's. As a result, we hold that Hirsch's general demurrers to the FAC should not have been sustained. With regard to Hirsch's various special demurrers, we hold that either they were not well-taken or, if well-taken, the pleading defect does not warrant sustaining the demurrer without leave to amend. Accordingly, we reverse the judgment and remand for further proceedings consistent with our holding.

BACKGROUND

I. Plaintiff's Agreement with Defendant[2]

In 2008, in connection with their divorce, Hirsch's ex-husband agreed to pay her $48,959 (the Divorce Settlement). In 2009, however, Hirsch's ex-husband filed for Chapter 13 bankruptcy protection in federal court. When Hirsch's ex-husband filed for bankruptcy protection, he owed her approximately $50,000 in principal and interest. Under the proposed repayment plan that Hirsch's ex-husband submitted to the bankruptcy court, he would pay Hirsch over a five-year period a total of $700.

In order to recoup more than just $700 from her ex-husband's bankruptcy estate, Hirsch sought help from Burk. Although Burk told Hirsch that he was not an attorney, he

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upheld if any of the grounds stated in the demurrer is well taken.'" (*Muraoka v. Budget Rent-A-Car, Inc*. (1984) 160 Cal.App.3d 107, 114–115.)

[2] This discussion is based on the facts alleged in the FAC.

agreed to help, for a price. On March 1, 2009, Hirsch agreed to pay Burk the "first $5,000" that she received from the Divorce Settlement.

On or about March 29, 2009, Hirsch learned that that Burk had "figured out a smart way to get standing to represent [her] in the bankruptcy"—Hirsch would assign a portion of the Divorce Settlement to Burk, making him a creditor in the bankruptcy proceeding, thereby allowing him to participate in the proceedings and protect both his and her interests in the Divorce Settlement. After learning of Burk's plan, Hirsch sent an email to Burk offering to pay him 25 percent of whatever she received from the Divorce Settlement. In addition, Hirsch agreed to pay "all costs and fees" associated with Burk's participation in the bankruptcy proceeding. Burk accepted her offer.

Over the course of the next few days, Burk and Hirsch agreed on the details of how Burk would get paid for his "nonlawyer" services in connection with the bankruptcy proceeding. Among other things, the parties agreed that Hirsch would be responsible for collecting and disbursing all monies collected as part of the Divorce Settlement.

During the course of the bankruptcy proceeding, Burk rendered various services to Hirsch, including "obtain[ing] a different repayment plan" than the one proposed by Hirsch's ex-husband.

In 2010, the bankruptcy proceedings were "terminated." Burk, despite demanding payment from Hirsch, never received any payment from her for his services. Believing that Hirsch defrauded him—Hirsch "never intended to pay [him] any money" that she received from the bankruptcy proceeding—Burk decided to sue Hirsch.

II. Plaintiff's Claims Against Defendant[3]

A. Plaintiff's Original Complaint

On or about February 21, 2013, Burk, proceeding in pro. per., filed his initial complaint against Hirsch.[4] Hirsch demurred to the complaint, contending that the pleading failed to state a claim under any of its many legal theories of recovery, that it was fatally uncertain, and that it failed to even allege whether the contract at issue was written, oral, or implied by conduct.

The trial court sustained Hirsch's demurrer with leave to amend. The trial court also ruled that with the filing of any amended complaint, "'plaintiff is ordered to include with such filing (a) a true and correct copy of plaintiff's claim in the bankruptcy court, (b) all court orders by the bankruptcy court concerning plaintiff's claim in the bankruptcy court, and (c) if plaintiff has not been paid as ordered by the bankruptcy court, plaintiff shall explain why he should not pursue his claim in bankruptcy court. Additionally,

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[3] Burk has asserted a number of different claims against Hirsch in a number of different forms and forums. Initially, Burk, as the general partner of KG Partners, sued Hirsch in a "limited" civil case. Burk involved KG Partners in his dispute with Hirsch, because he had assigned his interest in the proceeds from his agreement with Hirsch to KG Partners. This initial complaint in the "limited" case was confined to just four contract-based causes of action. Burk, as KG Partners' general partner, subsequently filed a first amended complaint that expanded the causes of action from four to 11, including several tort claims. KG Partners subsequently dismissed its "limited" civil action against Hirsch, and re-filed its claims as an "unlimited" civil case, alleging all of the same causes of action as it had in its amended pleading in the "limited" civil case, but adding a partition claim and two fraud claims, and seeking greater damages. KG Partners subsequently dismissed its unlimited civil action so that Burk could assert his claims directly in the current action.

[4] Although Burk's original complaint in the proceeding below was not included in the record on appeal, it appears from the parties' briefings on its successor to have been substantively similar to the complaint filed by KG Partners in its "unlimited" action.

plaintiff shall provide the court with the name, address, and telephone number of the bankruptcy trustee.'" [5]

B. Plaintiff's FAC

On July 18, 2013, Burk filed his FAC, alleging 14 separate causes of action. The FAC included both tort (e.g., conversion and fraud) and contract-based claims (e.g., breach of contract, breach of the implied covenant of good faith and fair dealing, quantum meruit, etc.), and it sought compensatory damages, punitive damages, and declaratory relief. Despite the trial court's order that he attach additional supporting exhibits to any amended pleading, Burk attached to the FAC only the same exhibits that he had attached to his original complaint—exhibits which the trial court had previously found to be insufficient by the trial court. In addition, Burk failed to (a) explain in the FAC why he should not pursue his claim in bankruptcy court and (b) include in the FAC the name and contact information for the bankruptcy trustee, as required by the trial court.

Hirsch demurred, generally and specifically, to the FAC, arguing that the FAC suffered from the same flaws as the original complaint, most notably that all of the causes of action were premised on an unlawful agreement in which Burk, a nonlawyer, agreed to perform legal services for Hirsch.

On June 30, 2015, the trial court sustained Hirsch's demurrer without leave to amend. Burk timely appealed.

DISCUSSION

I. Standard of review

We independently review the ruling on a demurrer and determine de novo whether the pleading alleges facts sufficient to state a cause of action. (*McCall v. PacifiCare of*

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[5] The request for information about the bankruptcy trustee arose because Burk apparently alleged in his original complaint that he had met with the trustee, who agreed that Burk had standing to participate in the bankruptcy proceeding and who also reviewed the matter with the bankruptcy judge, who also approved of Burk's participation as a co-creditor. The FAC contains similar allegations.

Cal., Inc. (2001) 25 Cal.4th 412, 415.) We assume the truth of the properly pleaded factual allegations, facts that reasonably can be inferred from those expressly pleaded, and facts of which judicial notice can be taken. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) "If the allegations in the complaint conflict with the exhibits, we rely on and accept as true the contents of the exhibits. However, in doing so, if the exhibits are ambiguous and can be construed in the manner suggested by plaintiff, then we *must* accept the construction offered by plaintiff." (*SC Manufactured Homes, Inc. v. Liebert* (2008) 162 Cal.App.4th 68, 83, italics added.)

"It is not the ordinary function of a demurrer to test the truth of the plaintiff's allegations or the accuracy with which he describes the defendant's conduct. A demurrer tests only the legal sufficiency of the pleading." (*Committee on Children's Television, Inc. v. General Foods Corp*. (1983) 35 Cal.3d 197, 213.) Accordingly, in considering the merits of a demurrer, "the facts alleged in the pleading are deemed to be true, however *improbable* they may be." (*Del E. Webb Corp. v. Structural Materials Co*. (1981) 123 Cal.App.3d 593, 604, italics added.)

If, as here, the trial court sustained the demurrer without leave to amend, we must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) If we find that an amendment could cure the defect, we conclude that the trial court abused its discretion and we reverse; if not, no abuse of discretion has occurred. (*Ibid*.)

II. There are insufficient grounds to sustain the demurrer without leave to amend

As previously noted,[6] because the trial court failed to identify the grounds upon which it sustained the demurrer to the FAC, we will uphold the court's ruling if any of the grounds stated in the demurrer is well taken. (*Muraoka v. Budget Rent-A-Car, Inc*., *supra*, 160 Cal.App.3d at pp. 114–115.) As discussed in more detail below, we hold that

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[6] See footnote 1, above.

Hirsch's general demurrers to the FAC should not have been sustained.[7] With regard to Hirsch's various special demurrers, we hold that they were either not well taken or, if well-taken, the pleading defect does not warrant sustaining the demurrer without leave to amend.

A. Hirsch's general demurrer to all causes of action should have been overruled

Hirsch demurred generally to the FAC on the ground that each cause of action failed to state a claim because each was premised on an unlawful agreement regarding the unauthorized practice of law. Hirsch, in large part, based her general demurrer on her interpretation of the parties' agreement as it is memorialized, in part, in an email exchange with Burk. On March 29, 2009, Hirsch emailed Burk stating that "[Her brother] said you figured out a *smart way to get standing to represent me in the bankruptcy*, i.e., if I assign to you a share in the property settlement that [her ex-husband] owes me, then you have a right to fight the bankruptcy as a creditor. Would you agree to 25% of the property settlement (and I will cover all fees and costs)?" (Italics omitted.) On April 1, 2009, Burk emailed Hirsch back, stating, "I agree to your offer." Hirsch focused on the italicized portion, arguing that "[i]t is undeniable that the 'smart way' which Gerry Burk 'figured out' constitutes the Unauthorized Practice of Law, perpetuates a fraud, and constitutes a blatant violation of Section 6126 (a) of the Business and Professions Code . . . ." According to Hirsch, the email exchange "specifically indicates that the plan was for Mr. Burk to represent [Hirsch] in the bankruptcy." (Boldface and underline omitted.)

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[7] There are two grounds for a general demurrers: failure to state a cause of action (or defense) (Code Civ. Proc., § 430.10, subd. (e)); and a lack of subject matter jurisdiction (Code Civ. Proc., § 430.10, subd. (a)). (*McKenney v. Purepac Pharmaceutical Co.* (2008) 167 Cal.App.4th 72, 77 [quoting 5 Witkin, Cal. Procedure (4th ed.1997), Pleading, § 904(3)].) All other grounds for a demurrer are commonly referred to as "special demurrers."

There are several problems with Hirsch's argument. First, as a preliminary matter, Hirsch's argument appears to be diametrically opposed to a position she took before the bankruptcy court, a position which was apparently successful. In that proceeding, Hirsch's ex-husband opposed Burk's proposed status as a co-creditor, arguing that Burk was engaging in the unauthorized practice of law. In a sworn declaration submitted in opposition to her ex-husband's objection, Hirsch stated that Burk was not engaged in the unauthorized practice of law: "I approached Gerry Burk to help me in the bankruptcy proceedings. Mr. Burk informed me that he is not a lawyer and can only act as a scrivener and what I was requesting him to do was beyond what he is allowed to do at law. Nonetheless, he said that he would discuss the matter with attorneys he knew to see if he could participate. He did and he was told that if he owned a direct pecuniary interest in the matter he could do what I wanted as we would be co-owners of the debt. He also conditioned his participation on approval of the court so that everything would be known to the court and that if the court refused to let him participate he would not[,] as he would not violate the law. I agreed to the conditions . . . ." [8] The bankruptcy court subsequently overruled the objection of Hirsch's ex-husband to Burk's participation in the bankruptcy proceeding, finding that Hirsch and Burk had "one general unsecured claim . . . in the amount of 48, 982.69." [9]

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[8] Burk submitted Hirsch's declaration from the bankruptcy as part of his opposition to Hirsch's demurrer. It is not clear from the record before us whether Burk asked the trial court to take judicial notice of this bankruptcy court record pursuant to section 452, subdivision (d) of the Evidence Code. It is also unclear from the record whether Hirsch filed any evidentiary objections to any of the materials Burk submitted in opposition to the demurrer (including her declaration), and what ruling, if any, was made by the trial court on any such evidentiary objections.

[9] Burk argues that, as a result of Hirsch's successful opposition to her ex-husband's objection to Burk's participation in the bankruptcy proceeding, Hirsch is collaterally and judicially estopped from arguing in this action that their agreement called for Burk to illegally practice law. On the record before us, we are unable to determine the merits of these arguments.

Second, and more critically, the language on which Hirsch relies so heavily is, as her own sworn declaration suggests, subject to a number of different and competing interpretations, one of which Burk advances in the FAC—that is, he was not acting or trying to act as her legal counsel in the bankruptcy proceedings or otherwise trying to engage in the unauthorized practice of law; rather, at all times he was trying to act within the confines of the law and simply advance their overlapping interests as co-creditors.

It is well established that "where an ambiguous contract is the basis of an action, it is proper, if not essential, for a plaintiff to allege its own construction of the agreement. So long as the pleading does not place a clearly erroneous construction upon the provisions of the contract, in passing upon the sufficiency of the complaint, we *must* accept as correct plaintiff's allegations as to the meaning of the agreement." (*Marina Tenants Assn. v. Deauville Marina Development Co*. (1986) 181 Cal.App.3d 122, 128, italics added.)

Accordingly, because the email attached to the FAC is ambiguous and can be reasonably construed in the manner suggested by Burk, we must accept the construction offered by Burk. (*SC Manufactured Homes, Inc. v. Liebert, supra,* 162 Cal.App.4th at p. 83.) While Burk's interpretation of the disputed agreement with Hirsch ultimately may prove invalid,[10] we hold that it was improper for the trial court at this stage of the litigation to resolve the issue against Burk based solely on the allegations of the FAC and the exhibits attached thereto. (*Aragon–Haas v. Family Security Ins. Services, Inc*. (1991) 231 Cal.App.3d 232, 239.)

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[10] During the course of oral argument, Burk, at times, came perilously close to describing his work for Hirsch as work that might well be constituted on the practice of law. For example, Burk stated that, among other things, he performed "financial analysis" for Hirsch. Depending on the exact context, such work might or might not be considered the practice of law. (See *Baron v. City of Los Angeles* (1970) 2 Cal.3d 535, 543 [activity constitutes practice of law if it involves application of legal knowledge and technique].)

B. Hirsch's special demurrers for uncertainty as to all causes of action should have been overruled or sustained with leave to amend

Hirsch demurred specially to all causes of action on two different grounds that the FAC was uncertain. (Code Civ. Proc., § 430.10, subd. (f).) First, Hirsch argued that Burk "failed to provide any specificity in the allegations as to what 'services' or 'help' paralegal Burk was to provide under the alleged agreement"; because all of the causes of action were based on the purportedly unlawful agreement for legal services, each cause of action was fatally uncertain. Second, Hirsch argued that, because each cause of action was premised on her defrauding Burk, and because Burk failed to allege the fraud with particularity, all of the causes of action failed for uncertainty.

"[D]emurrers for uncertainty are disfavored, and are granted *only* if the pleading is so incomprehensible that a defendant cannot reasonably respond." (*Lickiss v. Financial Industry Regulatory Authority* (2012) 208 Cal.App.4th 1125, 1135, italics added.) As a result, a "demurrer for uncertainty is strictly construed, even where a complaint is in some respects uncertain, because ambiguities can be clarified under modern discovery procedures." (*Khoury v. Maly's of California, Inc*. (1993) 14 Cal.App.4th 612, 616.)

With regard to the FAC's purported uncertainty about the services Burk provided, Hirsch's demurrer is not well taken. A demurrer for uncertainty is unsustainable when the facts in the pleading that are purportedly uncertain concern matters that are presumptively within a defendant's own knowledge. (See *Beeler v. West American Finance Co.* (1962) 201 Cal.App.2d 702, 706 [citing cases].) "Where the allegations of the complaint are sufficiently clear so as to apprise a defendant of the issues he must meet, a special demurrer should not be sustained, even though the allegations of the complaint may not be as clear or as detailed as might be desired." (*Ibid*.) Here, while we acknowledge that the FAC's allegations about the nature and extent of the services Burk provided to Hirsch are not very detailed, they do not need to be. A complaint, with certain exceptions, need only contain a "statement of the facts constituting the cause of action, in ordinary and *concise* language." (Code Civ. Proc., § 425.10, italics added.) A

complaint will be upheld "'so long as it gives notice of the issues sufficient to enable preparation of a defense.'" (*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 549–550.) Because Hirsch never argued or even suggested that the FAC compromised her preparation of a defense, we hold that the FAC was not uncertain with regard to the services rendered by Burk to Hirsch.

As for his fraud allegations, Burk was obligated to plead those factual averments with particularity—that is, he needed to plead facts which """"show how, when, where, to whom, and by what means the representations were tendered.""""" (*Small v. Fritz Companies, Inc*. (2003) 30 Cal.4th 167, 184.) In the FAC, Burk alleged that Hirsch, in both written and oral communications in March and April 2009, including a "face to face meeting at [Burk's] residence" on March 1, 2009, promised to pay him for his services in connection with helping her secure a larger settlement than the one proposed by her ex-husband in the bankruptcy proceeding. Burk further alleges that he relied on Hirsch's promises to his detriment—he sought advice from attorneys, discussed options with the bankruptcy trustee, and took the steps necessary to make himself a co-creditor with Hirsch on the claim regarding the Divorce Settlement, and, despite doing all this, he did not receive any payment from Hirsch. Although Burk's fraud allegations could have been improved by adding more factual detail in a number of respects (e.g., he could and probably should have alleged the amount Hirsch received from her ex-husband's bankruptcy estate for the Divorce Settlement), the allegations were, nonetheless, sufficient for pleading purposes. Accordingly, the special demurrer for uncertainty as to the fraud allegations should have been overruled. At worst, the special demurrer should have been sustained with leave to amend, because additional factual details about the fraud, arguably, would have been within Burk's ability to provide. We therefore hold that sustaining the demurrer without leave to amend the fraud allegations would have been an abuse of discretion.

C. Hirsch's special demurrer as to all causes of action for uncertainty about the exact nature of the parties' agreement should have been sustained with leave to amend

Hirsch argued that it was unclear from the FAC's allegations whether the alleged agreement between the parties was "written, oral or implied by conduct," and as a result, all causes of action were defective. (Code Civ. Proc., § 430.10, subd. (g).)

Hirsch is correct: the FAC does not definitively state what kind of agreement—written, oral or implied by conduct—is at issue. Such knowledge would be important for potential arguments about the statute of limitations[11] or the statute of frauds.[12]

The FAC, however, strongly suggests that there was an oral agreement reached in early 2009 and that this oral agreement was subsequently reduced to a writing and submitted to the family law court overseeing the Hirschs' divorce proceeding. The FAC further suggests that this written agreement was then modified in late March 2009 by both written and oral communications. While the FAC is not definitive in this regard,[13] Hirsch's special demurrer on this ground "is a purely technical argument." (*Miles v. Deutsche Bank National Trust Co*. (2015) 236 Cal.App.4th 394, 401.) And, as such, it appears that it can be readily corrected by amendment; certainly, Hirsch has not identified any reasons why leave to amend would be futile. (*Vaillette v. Fireman's Fund Ins. Co*. (1993) 18 Cal.App.4th 680, 685 ["leave to amend should *not* be granted where . . . amendment would be futile"].) "Where there is a reasonable possibility an

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[11] Depending on whether the agreement was written or oral, a different statute of limitations would apply. (Compare Code Civ. Proc., § 339 [two year limitations period for oral contracts] with Code Civ. Proc., § 337 [four year limitations period for written contracts].)

[12] The statute of frauds renders invalid any oral contract that "by its terms is not to be performed within a year from the making thereof." (Civ. Code, § 1624, subd. (a)(1); *White Lighting Co. v. Wolfson* (1968) 68 Cal.2d 336, 343.)

[13] For his part, Burk argues that there was not one written contract, but two: a "note" and then a subsequent "agreement."

amendment will cure a defective pleading, it is ordinarily an abuse of discretion to deny a party the chance to cure the defect." (*Ibid*.) Consequently, it would have been an abuse of discretion to sustain Hirsch's demurrer to all 14 causes of action on this ground without leave to amend.

D. Hirsch's general demurrers to specific causes of action should have been overruled

In addition to demurring generally to all causes of action in the FAC, Hirsch demurred generally to different subsets of claims and to individual claims: (1) Hirsch argued that four causes of action ("'Declaratory Relief-Note'"; "'Breach of Note'"; "'Conversion-Note'"; and "'Fraud-Note'") failed to state a claim because Burk failed to allege the elements of a promissory note; (2) Hirsch argued that the conversion causes of action ("Conversion-Note" and "Conversion-Agreement") failed to state a claim because the amount of money at issue was not a definite sum; and (3) the partition cause of action failed to state a claim because Burk failed to allege all of the requisite elements for such a claim.

1. THE "PROMISSORY NOTE" CLAIMS

In the FAC, Burk contends that an "Assignment of Judgment and Priority Rights," signed by Hirsch and Burk and filed with the court handling Hirsch's divorce is a "written non-promissory note" (the Note). Under the terms of the Note, Hirsch, for "good and valuable consideration," assigned a "$5,000 interest" in the Divorce Settlement to Burk and further assigned to Burk a priority interest in the Divorce Settlement "in that the first $5,000 received" would belong to Burk. Four causes of action are premised on the Note.

Hirsch argues that the four causes of action based on the Note are fatally flawed because "[t]here are no allegations in the [FAC] sufficient to make a prima facie showing of the existence of a promissory note." Hirsch's argument misses the point—according to the express allegations of the FAC, the Note is *not* a promissory note. A note, of which there are many different variations, is commonly understood in the law to mean

simply a "written promise by one party to pay money to another party." (Black's Law Dictionary (10th ed. 2014) p. 1225, col. 2.; see Cal. U. Com Code, §3104, subd. (e) ["An instrument is a "note" if it is a promise"].) In contrast, a promissory note is commonly understood to mean "an unconditional written promise, signed by the maker, to pay absolutely and in any event a certain sum of money . . . to the bearer or designated person." (Black's Law Dictionary (10th ed. 2014) p. 1226, col. 1.) Because the Note described in the FAC is not an unconditional promise to pay a certain sum, but a conditional promise to pay some amount up to $5,000, Hirsch's demurrer is fatally flawed. Accordingly, Hirsch's demurrer to the Note-based claims on the ground that Burk failed to allege the elements of a promissory note should have been overruled.

2. THE CONVERSION CLAIMS

Hirsch argued that the two conversion causes of action in the FAC failed to state a claim because the amount of money at issue was "not a definite sum." Hirsch's argument is without merit for two principal reasons. First, the FAC does allege specific amounts for each conversion cause of action: $7,035 for "conversion-note"; and $17,590 for "conversion-agreement." Second, the cases that Hirsch relies upon (*Vu v. California Commerce Club, Inc.* (1997) 58 Cal.App.4th 229; and *PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP* (2007) 150 Cal.App.4th 384 (*PCO, Inc.*)) are inapposite—they concern summary judgment motions, not demurrers. In fact, one of those cases, draws a sharp distinction between what allegations are required to allege a conversion cause of action and what evidence is required to sustain such a cause of action: "plaintiffs may have stated a cause of action for conversion by alleging, in effect, an amount of cash 'capable of identification.' [Citation.] . . . But at the summary judgment stage, plaintiffs failed to present evidence of a definite, identifiable sum of money." (*PCO, Inc*., at p. 397.)

In light of the FAC's allegations of specific amounts due and Hirsch's inapposite authorities, the demurrer to the conversion causes of action should have been overruled.

3. THE PARTITION CLAIM

Hirsch contends that the partition cause of action fails to state a claim because the necessary elements for such a claim have not been alleged. Hirsch, however, has failed to identify exactly which elements are missing from the allegations in the FAC. Our review of the FAC shows that Burk has alleged all of the elements required under section 872.230 of the Code of Civil Procedure for a partition cause of action: Burk has alleged in the FAC a description of the property at issue (Divorce Settlement payments), the respective interests that he and Hirsch have in that property, and a request for relief. Accordingly, a demurrer to this cause of action should have been overruled.

DISPOSITION

The judgment is reversed. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

LUI, J.